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No. 80-1834

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES DUARTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's court-ordered compliance with a grand jury subpoena for business records required by law to be kept by providers of Medicare and Medicaid services violated his Fifth Amendment privilege against compulsory self-incrimination.

2. Whether petitioner was denied his right to counsel at a hearing on the government's motion to compel compliance with the grand jury subpoena.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A12-A14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1980. A petition for rehearing was denied on January 21, 1981. On March 11, 1981, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 13, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 10 counts of submitting false claims to the United States, in violation of 18 U.S.C. 287, and 10 counts of mail

fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to four years' probation and a $10,000 fine. The court of appeals affirmed.

Petitioner owned and operated a medical laboratory, known as the Professional Group Laboratories ("PGL"), that performed various kinds of blood tests for Medi-Cal patients.[1] Petitioner referred some of these tests to outside laboratories for analysis and improperly billed Medi-Cal for amounts in excess of what he was charged by the outside laboratories.

On January 9, 1979, petitioner was arrested on a complaint charging him with offering to pay a kickback in connection with his provision of services to Medicare and Medi-Cal patients, in violation of 42 U.S.C. 1395mm(b)(2). The complaint was dismissed on February 27, 1979.

Subsequently, a grand jury subpoena (Pet. App. A1-A4), dated April 11, 1979, and addressed to the custodian of records at petitioner's laboratory, was served on petitioner. The subpoena required the production of PGL records, including billings submitted to PGL by laboratories that did reference work for PGL, documents detailing the nature of such work, and billings that PGL submitted to Medicare and Medi-Cal. In May 1979, petitioner's attorney advised the United States Attorney's office that petitioner would refuse to produce the subpoenaed documents on the ground that they were protected from production by petitioner's privilege against compulsory self-incrimination. On July 18, 1979, petitioner refused to produce the subpoenaed records, asserting his Fifth Amendment privilege before the grand jury (Pet. App. A6-A7).

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[1] Medi-Cal is a health insurance program administered by the State of California. The federal government supplies 50% of the funds expended by the Medi-Cal program.

Thereafter, the government moved to compel production, and a hearing was held on this motion on September 10, 1979. Petitioner appeared at the hearing without counsel, informing the court that his attorney had died two months previously. Following a discussion, the district court ordered petitioner, "as custodian" of the records of PGL, or "his duly authorized representative" to produce the subpoenaed documents before the grand jury (Sept. 10, 1979 Tr. 3-7). Petitioner then produced the subpoenaed records.

On December 4, 1979, the grand jury indicted petitioner. Petitioner moved to suppress the records he had produced on the grounds that the records were obtained in violation of his Fifth Amendment privilege against compulsory self-incrimination and his Sixth Amendment right to counsel. The district court denied the motion, ruling that because the PGL records were required by law to be kept by laboratories rendering services to Medi-Cal patients, petitioner could not assert any Fifth Amendment privilege against mandatory production of the records. The court further held that petitioner's constitutional right to counsel did not attach at the hearing to compel production (Pet. App. A5-A11). Following petitioner's conviction, the court of appeals affirmed, rejecting his Fifth and Sixth Amendment arguments for the same reasons given by the district court (Pet. App. A12-A14).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that he was compelled to produce business records in violation of his privilege against compulsory self-incrimination. This contention is without merit.

It is well established that the Fifth Amendment privilege against compulsory self-incrimination does not attach to "records required by law to be kept in order that there may be suitable information of transactions which are the

appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Wilson* v. *United States*, 221 U.S. 361, 380 (1911), quoted in *Davis* v. *United States*, 328 U.S. 582, 590 (1946), and in *Shapiro* v. *United States*, 335 U.S. 1, 17 (1948). See also *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968).

The district court and the court of appeals properly ruled that the subpoenaed records fell within the "required records" exception to the Fifth Amendment privilege, and further review of that determination is unwarranted. Petitioner conducted a business that provided health care services that were reimbursed by the United States. Such businesses are required "(A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (B) to furnish the State agency with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency may from time to time request." 42 U.S.C. 1396a(a)(27). Moreover, the applicable regulation, 42 C.F.R. 405.406(d)(2), requires businesses like petitioner's to maintain such records as are

> necessary to ascertain information pertinent to the determination of the proper amount of program payments due. These records shall include, but not be limited to, matters of provider ownership, organization, and operation; fiscal, medical, and other record-keeping systems; Federal income tax status; asset acquisition, lease, sale or other action; franchise or management arrangements; patient service charge schedules; matters pertaining to costs of operation; amounts of income received by source and purpose; and flow of funds and working capital.[2]

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[2]The regulatory purpose of these requirements is evident from the congressional declaration of purpose in the Medicare and Medicaid

The subpoenaed records at issue here consisted of records describing the billing for services that were reimbursed by federal funds (Pet. App. A2-A4). Such records are routinely kept by businesses such as petitioner's and "are necessary fully to disclose the extent of the services provided * * *." They are essential "to the determination of the proper amount of program payments due." The central purpose in such recordkeeping requirements is to permit the government to verify the legitimacy of expenses in order to assure that its funds are spent in conformity with the laws and regulations governing the Medicare and Medicaid programs.

For these reasons, no Fifth Amendment privilege attached to the subpoenaed records that were required by law to be kept for a legitimate governmental regulatory purpose. Accord, *Shapiro* v. *United States, supra; United States* v. *Stirling*, 571 F. 2d 708, 727-728 (2d Cir.), cert. denied, 439 U.S. 824 (1978); *United States* v. *Scherer*, 523 F. 2d 371, 375-376 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976); *United States* v. *Rosenberg*, 515 F. 2d 190, 199-200 (9th Cir.), cert. denied, 423 U.S. 1031 (1975); *In re Grand Jury Subpoena to Custodian of Records*, 497 F. 2d 271 (6th Cir. 1974); *United States* v. *Warren*, 453 F. 2d 738, 742 (2d Cir.), cert. denied, 406 U.S. 444 (1972); *Matter of Sigety* v. *Hynes*, 38 N.Y. 2d 260, 268 (1975).[3] The fact that petitioner was the person who had produced the records in response to the subpoena was not used against him at trial, and that sufficed to avert any potential infringement of petitioner's privilege against compulsory self-incrimination.

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enabling legislation. See 42 U.S.C. 1320c. Congress sought "to promote the effective, efficient, and economical delivery of health care services of proper quality * * *." Contrast *Grosso* v. *United States, supra*; *Marchetti* v. *United States*, 390 U.S. 39, 56-57 (1968).

[3]Petitioner's contention (Pet. 8) that in *Fisher* v. *United States*, 425 U.S. 391 (1976), the Court overruled the long-standing "required records" doctrine is without foundation. *Fisher* held that a taxpayer's

2. Petitioner also argues (Pet. 10-18) that he was deprived of his Sixth Amendment right to counsel at the hearing on the motion to compel compliance with the grand jury subpoena and that he should have been warned of his rights at that time. These contentions are insubstantial.

A person's Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him * * * whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion); *Estelle* v. *Smith*, No. 79-1127 (May 18, 1981), slip op. 14. No such proceedings were pending against petitioner at the time of the hearing on the government's motion to compel,[4] and petitioner, who was subpoenaed before the grand jury to produce records that he had no right to withhold, had no constitutional right to counsel at that point. *Kirby* v. *Illinois, supra; United States* v. *Mandujano*, 425 U.S. 564, 581 (1976).

Petitioner also argues that he should have been advised of his right to consult with an attorney and that he should have been given unspecified additional warnings at the hearing on the motion to compel. However, because petitioner had no right to counsel at the hearing, he was not entitled to any such warning. In any event, inasmuch as petitioner was represented by an attorney previously in connection with the subpoena, he clearly was aware that he could consult

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Fifth Amendment privilege does not bar a subpoena from directing either the taxpayer or his attorney to produce documents relating to the accountant's preparation of the taxpayer's tax returns. The Court in *Fisher* did not even discuss the required records doctrine.

[4]The original complaint against petitioner had been dismissed. The district court found (Pet. App. A5-A6) that "[t]here is no evidence that the government dismissed the original complaint with the intention of later seeking an indictment." Petitioner does not challenge this finding.

with an attorney. Nor were any other warnings required. Under this Court's decisions, prophylactic warnings of the kind mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are necessary only during custodial interrogation or in some analogous situations with a comparable potential for official overbearing. See *Estelle* v. *Smith*, *supra*, slip op. 11-14 & n.13; *United States* v. *Washington*, 431 U.S. 181, 190 (1977); *Beckwith* v. *United States*, 425 U.S. 341, 345-348 (1976). A witness's appearance before a grand jury in response to a subpoena, however, is not a "seizure" within the meaning of the Fourth Amendment, *United States* v. *Dionisio*, 410 U.S. 1, 8-18 (1973), and, as this Court has noted, "judicial inquiries," like the hearing at issue here, are not equivalent to "custodial interrogation." *United States* v. *Mandujano*, *supra*, 425 U.S. at 579. Accordingly, petitioner was not entitled to any additional warnings.

Furthermore, because petitioner obviously was aware of his right to consult with counsel, and because he in fact argued that his privilege against compulsory self-incrimination barred enforcement of the subpoena, it is difficult to understand what additional benefit could have been conferred on petitioner by the warnings that he contends he should have received. Finally, the only "injury" of which petitioner complains is that he was ordered to do that which he was in fact legally obliged to do—turn his business records over to the grand jury. Even had he been wrongly deprived of the assistance of counsel in the grand jury's lawful process, suppression of the fruits of his compliance with the subpoena would not be a proper remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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